

California Fair Political Practices Commission

MEMORANDUM

To: Chairman Randolph, Commissioners Blair, Downey, Karlan, and Knox

From: Natalie Bocanegra, Commission Staff Counsel
Luisa Menchaca, General Counsel

Re: Personal Loans (§ 85307) – Adoption of Proposed Amendments to Regulation 18530.8

Date: September 21, 2004

I. EXECUTIVE SUMMARY

In light of the recent litigation and pending legislation, the Commission has re-examined its prior interpretation of the section 85307 provisions pertaining to the \$100,000 personal loan limit. At its August 2004 meeting, the Commission considered the regulation and made decisions regarding the following:

- **Personal Loan Limit:** Should the Commission amend subdivision (c) of regulation 18530.8 to provide that the \$100,000 personal loan limit of section 85307 is applicable to proceeds of a loan made to a candidate by a commercial lending institution for which the candidate is personally liable?

Commission Decision: Amendments to regulation 18530.8 should be noticed and brought back to the Commission for adoption. These amendments should provide that the \$100,000 personal loan limit is applicable to proceeds of a loan made to a candidate by a commercial lending institution

- **Commercial Loan:** Should the Commission describe by regulation when it is that loans are made “by a commercial lending institution in the lender’s regular course of business on terms available to members of the general public?”

Commission Decision: If a rule is adopted that the \$100,000 personal loan limit is applicable to proceeds of a loan made by a commercial lending institution, further regulatory description is not necessary.

Senate Bill 1449, before the Governor for his signature, may amend section 85307 to provide that state candidates are subject to a \$100,000 personal loan limit under any circumstances. However, the Commission continues to have authority to amend current regulatory rules pertaining to the loan limit. Staff recommends that the Commission proceed with determining whether regulation 18530.8(c) should be amended to provide

that the \$100,000 limit of section 85307 applies to loans from commercial lending institutions.

II. PERSONAL LOAN LIMIT

A. Background

Section 85307, which was enacted by Proposition 34, states:

“(a) The provisions of this article regarding loans apply to extensions of credit, but do not apply to loans made to a candidate by a commercial lending institution in the lender’s regular course of business on terms available to members of the general public for which the candidate is personally liable.

(b) A candidate for elective state office may not personally loan to his or her campaign an amount, the outstanding balance of which exceeds one hundred thousand dollars (\$100,000). A candidate may not charge interest on any loan he or she made to his or her campaign.”

Pursuant to section 85307, a candidate for elective state office may not personally loan to his or her campaign an amount, the outstanding balance of which exceeds \$100,000. In 2001, the Commission interpreted subdivision (a) of this section to mean that the \$100,000 limit does not “apply to loans made to a candidate by a commercial lending institution in the lender’s regular course of business on terms available to members of the general public for which the candidate is personally liable.”

Specifically, current regulation 18530.8 provides:

“(a) Any personal loan made before January 1, 2001, by a candidate for elective state office does not count toward the \$100,000 loan limit of subdivision (b) of Government Code section 85307.

(b) For purposes of subdivision (b) of Government Code section 85307 and this regulation, ‘campaign’ encompasses both the primary and general elections or special and special runoff elections for a specific term of elective state office. ‘Campaign’ includes any of the candidate’s controlled committees formed for the purpose of seeking that elective state office and all committees formed for the purpose of supporting the candidate’s candidacy for that elective state office.

(c) The proceeds of a loan made to a candidate by a commercial lending institution for which the candidate is

personally liable, pursuant to the terms of subdivision (a) of Government Code section 85307, which the candidate then lends to his or her campaign do not count toward the \$100,000 loan limit of subdivision (b) of Government Code section 85307.

(d) A candidate may make a series of personal loans to his or her campaign as long as the outstanding balance does not exceed \$100,000 at the time of making the loans. If a candidate's personal loan balance has reached the \$100,000 limit, the loan balance must be reduced before the candidate may make any additional loans to his or her campaign."

In January 2004, in *Camp v. Schwarzenegger*, Sacramento Superior Court, Case No. 03AS05478, a case was filed in which Plaintiffs challenged a \$4 million loan that gubernatorial candidate Arnold Schwarzenegger obtained from a commercial lending institution and loaned to his campaign as violative of section 85307. Judge McMaster ruled that while the loan was made on terms available to members of the general public, despite the fact that only a small percentage of the public could actually take advantage of those terms due to their personal financial status, section 85307(b) prohibited a candidate from personally loaning his or her campaign account more than \$100,000, regardless of the fact that the original source of the funds used by the candidate to fund the loan to his or her campaign was a commercial loan to the candidate, which met the requirements of section 85307(a). This latter conclusion conflicted with regulation 18530.8(c).¹

In response to *Camp v. Schwarzenegger*, Senate Bill 1449 (Johnson) (Attachment 1) was introduced to codify the ruling.² This bill provides that the proceeds of a loan obtained by a candidate from a commercial lending institution and loaned by the candidate to his or her campaign are subject to the \$100,000 personal loan limitation. This bill, upon which the Commission has a support position, has not been signed by the Governor as of the date of this memorandum.

In revisiting the interpretation of section 85307 in August, the Commission has considered the following rules that apply to loans and personal funds:

- Because a loan is considered a contribution, loans are ordinarily subject to the contribution limits set forth in the Act. (Section 82015.)
- A loan is not a contribution if the loan is received from a commercial lending institution in the ordinary course of business. (Section 84216(a).)

¹ However, the holding of the court does not have application beyond the parties involved since the matter was not appealed.

² The previous staff memorandum to the Commission on this item referred to Assembly Bill 2842. This bill did not pass the Legislature.

- A loan is not a contribution if it is clear from the surrounding circumstances that it is not made for political purposes.
- A loan from a candidate's personal funds to his or her campaign is a contribution to the candidate's campaign, but it is not subject to the contribution limits of section 85301 because those limits do not apply to a candidate's contribution of his or her own personal funds. (Section 85301(d).) Instead, with respect to personal loans, section 85307(b) imposes a limit of \$100,000 on the outstanding balance of the loan that a candidate may make to his or her campaign.

In addition, the Commission considered that section 85307(a) provides that "[t]he provisions of this article regarding loans ... do not apply to loans made to a candidate by a commercial lending institution in the lender's regular course of business on terms available to members of the general public for which the candidate is personally liable." This section applies to any candidate. In contrast, subdivision (b) of section 85307, which contains the \$100,000 limit on the outstanding balance, is limited in its application to candidates for elective state office. The question now addressed by the Commission is whether the \$100,000 limit imposed by section 85307(b) applies to the proceeds of a bank loan made to a candidate and then loaned by a candidate to his or her committee.

B. Two Reasonable Interpretations

Loans from Commercial Lending Institutions Do Not Count: After three Commission meetings and public input, the Commission determined that while the language "[t]he provisions of this article regarding loans" found in section 85307(a) refers to more than just section 85307(b), the term "loan" is not found elsewhere in the article. Therefore, only section 85307(b) can be included within its scope. This leads to the conclusion that section 85307(b) cannot apply to loans obtained by a candidate from commercial lending institutions in the ordinary course of business.³

By analyzing the process of a candidate taking a loan from a commercial lending institution and lending it to his or her campaign as *one* transaction instead of two separate transactions, bank loan proceeds are not subject to the limits imposed by section 85307(b). The Commission adopted this interpretation at its January 15, 2002, meeting, and it is reflected in regulation 18530.8(c).

Loans from Commercial Lending Institutions Do Count: Another possible interpretation of the statute is based on the conclusion that existing subdivision (a) does not limit application of subdivision (b)'s rule. Under this interpretation, one views the loan from the bank and the candidate's use of those funds as separate transactions even if arising out of the same set of facts, thereby analyzing subdivisions (a) and (b) separately.

³ As mentioned above, under section 84216, a loan from a commercial lending institution to a candidate in the ordinary course of business is not a contribution. Arguably, then, section 85307 cannot be read to impose a contribution limit on a loan from a commercial lending institution. Under this reading of section 85307(a), the personal loan \$100,000 limit of section 85307(b) is inapplicable to loans to a candidate from a commercial lending institution.

Pursuant to section 84216, a loan *to a candidate* from a commercial lending institution in the ordinary course of business is not a contribution to the candidate's campaign. Pursuant to section 85307(b), a loan *from a candidate* to his or her campaign is limited to an outstanding balance of \$100,000 at any given time. Therefore, by analyzing the process as two separate transactions, it is possible to conclude that when a commercial lending institution makes a loan *to a candidate*, the funds become an asset of the candidate in the first transaction. In the second transaction, the candidate converts the funds he or she received from the bank, and *the candidate loans the funds to his or her campaign*, thus making the funds subject to section 85307(b).⁴

If the Commission adopts this interpretation as embodied in the proposed amendments, staff recommends both the bank and the candidate be reported as the sources of the loan.

C. Statutory Construction

Based on the language of section 85307 with definitions drawn from other statutory provisions of the Act and past Commission advice, the Commission rejected the latter approach in January of 2002, through its adoption of current regulation 18530.8(c).

In contrast, the court in *Camp v. Schwarzenegger* found that regulation 18530.8(c) was an "erroneous and unreasonable construction" of section 85307. (*Camp, supra*, 20.) The court relied on its interpretation of section 85307(a) which included the conclusion that the statute is "not reasonably susceptible of a different interpretation." (*Camp, supra*, 11 – 20.) However, as discussed, the statute is capable of alternate interpretations, and prior staff analysis of section 85307(b) was conducted under a finding of ambiguity. (See staff memoranda: "Proposition 34 Regulations: Personal Loans (§ 85307) – Second Pre-Notice Discussion of Proposed Regulation 18530.8," October 25, 2001; "Proposition 34 Regulations: Personal Loans (§ 85307) – Adoption of Proposed Regulation 18530.8," December 27, 2001; and "Personal Loans (§ 85307) - Pre-notice Discussion of Proposed Amendments to Regulation 18530.8," July 23, 2004.)

When a statute is "ambiguous" (that is, capable of more than one reasonable interpretation), it is necessary to turn for assistance in interpretation to "extrinsic sources including the ostensible objects to be achieved and the legislative history." (*Estate of Griswold* (2001) 25 Cal.4th 904, 910-911.) In seeking to ascertain the legislative intent

⁴ In addition, section 85307(a) provides that extensions of credit, which may be considered loans will be deemed contributions subject to the limits of sections 85301 and 85302. This conclusion is reached by interpreting the term "article" in section 85307(a) to apply to contributions (as referenced in sections 85301 and 85302 and in other sections of the article), which include loans. In other words, section 85307(a) exists for the purpose of providing a contribution limitation on extensions of credit and extending the reporting rationale of section 84216 to Chapter 5, relating to contribution limits, while section 85307(b) exists to establish a \$100,000 limitation on a candidate's use of his or her own funds, regardless of the source of the funds. Another argument in support of this approach is that if the loan is not considered a contribution of a candidate's personal funds, the voluntary expenditure limits would never be lifted as long as a candidate used monies obtained through a bank loan. (Section 85402.)

(i.e., the voters' intent), the Commission reviewed the voter information pamphlet distributed to all registered voters in the state.⁵

Ultimately, when adopting regulation 18530.8, the Commission determined that while the ballot pamphlet addressed limitations by candidates as to their own funds, it did not directly address the issue of bank loans. (Commission minutes of January 15, 2002.) In order to give subdivision (a) meaning, the Commission weighed the evidence in favor of reading subdivisions (a) and (b) together. The Commission recognized that "this may be a regulation that will need legislation to fix." (Chairman Getman, Commission meeting minutes January 15, 2002.) Indeed, the Legislature sought to address this issue with legislation introduced during the 2003 – 2004 Legislative Session, including Senate Bill 1449.

However, it should be emphasized that, in interpreting section 85307, the Commission has the ability to reaffirm its adoption of regulation 18530.8(c) or to revise this regulatory rule. Consequently, the issue (**Decision Point 1**) before the Commission is whether the Commission now wishes to weigh the policy issues in favor of reading subdivisions (a) and (b) of section 85307 separately, as discussed above. A proposed amendment that would modify regulation 18530.8(c) to make it consistent with that in *Camp v. Schwarzenegger, supra*, is presented to the Commission for adoption. (Attachment 2.) If Senate Bill 1449 is signed into law, this proposed amendment would also be consistent with the resulting legislative amendments. If Senate Bill 1449 is not signed into law, the Commission continues to have the statutory authority to revise its regulation.

Staff Recommendation: Senate Bill 1449, if chaptered, will remove the ambiguity regarding the personal loan limit. If this bill is not enacted, a Commission decision on this matter may be beneficial by providing notice to candidates of the Commission's current rule since confusion may have resulted given the recent litigation. Because there is legal validity to either supporting or opposing the proposed amendment to regulation 18530.8(c), staff does not offer a recommendation on this issue but rather leaves this policy decision to the Commission.

Attachments

Attachment 1 – Senate Bill 1449

Attachment 2 – Proposed amendment to regulation 18530.8

⁵ Although Proposition 34 was a legislative initiative, the Legislature's intent in drafting section 85307 is not relevant since there is no indication that the voters had any idea of the drafters' intent. (*Taxpayers to Limit Campaign Spending v. Fair Political Practices Commission* (1990) 51 Cal.3d 744, 764, n. 10 (1990), noting that the motive or purpose of the drafters is not relevant since the opinion does not represent the intent of the electorate.) When seeking to ascertain the voters' intent, the normal procedure is to review the voter information pamphlet which is distributed to all registered voters in the state.